

NO. 86-2069

Supreme Court, U.S.

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in the
Supreme Court
of the
United States
OCTOBER TERM, 1986

REV. JACOB E. JUDGE AND SAMUEL JUDGE,
Petitioners,

vs.

CITY OF FORT LAUDERDALE, FLORIDA,
Respondent.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF FLORIDA

BRIEF OF RESPONDENT

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and

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STATEMENT OF THE CASE

This is a Response to the Petition for Writ of Certiorari to the Florida Supreme Court, arising from an order of that Court which was entered on March 17, 1987 (Petitioners' Appendix A. 1). The proceedings stem from an eminent domain proceeding instituted by the Respondent, the City of Fort Lauderdale, Florida (the "City") in 1980, which involved condemnation of approximately thirty parcels of land. An Order of Taking for all parcels had been entered on August 7, 1980 (Petitioners' Appendix, A. 3, page 4). The Petitioners (the "brothers") held an unrecorded Agreement for Deed with respect to one of the parcels of land sought to be acquired by the City in connection with a housing redevelopment project in Fort Lauderdale known as the "Near Northwest Redevelopment Project". (Petitioners' Appendix, A. 8, page 4). The brothers' interest in the parcel was not originally known to the City, since their existence did not appear of record. They were included within the proceedings (subsequent to entry of the Order of Taking) when their equitable property interest was discovered and they were identified (Petitioners' Appendix, A. 8, pages 4-6, 24).

Several months after they were added as parties to the condemnation suit, the brothers, with assistance of counsel, sought to set aside the original Order of Taking. At a hearing before the trial court on January 5, 1981, the City offered and agreed to "re-present the evidence" and afford the brothers "full opportunity" to cross-examine witnesses and present their own evidence in opposition to the City's claim of public necessity for the subject parcel (Petitioner's Appendix, A. 7, pages 3-4).

At a subsequent hearing, held on January 9, 1981, (Respondent's Appendix A. 1, pages 1-11, which is a transcript of a hearing on a Motion to Withdraw filed by Mr. Bush, the brothers' counsel), Mr. Bush apprised the trial court that it had been expected that "today would be a day in which the City of Fort Lauderdale would present—re-present its evidence on the necessity of taking of Mr. Judge's property" (Respondent's Appendix, A. 1, page 3). The City, represented by its attorney (Mr. Norman) inquired "if Mr. Judge would like us to proceed to put on evidence as to the necessity, or if he wants time to get another attorney, or whatever he wants to do so we know how to proceed" (Respondent's Appendix, A. 1, page 6). The trial court suggested to Mr. Judge that,

* * * if you would like, sir, the City is more than willing to go through the necessity order of taking procedure that, you know, they have done before.

(Respondent's Appendix, A. 1, page 7).

Mr. Judge's response was non-committal (Respondent's Appendix, A. 1, page 7). When the hearing concluded, the trial court told Mr. Judge that if he wanted a hearing on the public necessity matter, he was to notify the Court and the City (Respondent's Appendix, A. 1, page 9). Mr. Judge agreed to do so (Respondent's Appendix, A. 1, page 9).

On February 25, 1981, the Motion to Set Aside the Order of Taking was heard by the trial court (Petitioners' Appendix, A. 6). The court asked if Mr. Judge desired to have a hearing on the Order of Taking.

That opportunity was rejected (Petitioners' Appendix, A. 6, pages 3-4). The court then ruled that Mr. Judge's Motion to Set Aside the Order of Taking would be denied, "based on his representation to the Court today" (Petitioners' Appendix, A. 6, page 6).

More than four years later, a hearing was held on April 26, 1985, before a newly-assigned trial judge (Respondent's Appendix, A. 8). The hearing was sought by the current attorney for the brothers, for a determination as to whether the issue of public necessity had been knowingly waived by the brothers in early 1981. While the City concurs that the issue of waiver was raised by Petitioners in a document entitled "Joint Pre-trial Stipulation" (Petitioners' Brief, page 7), that Stipulation was not jointly filed and it was not signed by counsel for the City (see Petitioners' Appendix, A. 9, page 8). The City maintained that the only remaining issue in 1985 was the issue of compensation for the property (Petitioners' Appendix, A. 8, page 12). An Order ensued, in which the court concluded that the necessity issue had been "knowingly and intelligently waived" (Petitioners' Appendix, A. 5, page 2).

In March of 1986, a jury trial was held, resulting in a verdict of compensation for the parcel in the total amount of \$19,000.00 (Petitioners' Appendix, A. 3, page 4). The ruling pertaining to waiver of the public necessity issue was appealed by petitioners; after oral argument, it was Affirmed Per Curiam by the Fourth District Court of Appeal of Florida (Petitioners' Appendix, A. 2) and ultimately dismissed by the Florida Supreme Court (Petitioners' Appendix, A. 1). The latter Court's ruling also stated that "No Motion for Rehearing will be entertained by the court." (Petitioners' Appendix, A. 1). The present Petition followed.

SUMMARY OF ARGUMENT

The Florida courts have thoroughly scrutinized the factual issue of waiver. They properly concluded that the City need not re-present evidence of its public necessity to acquire the subject land. Jacob Judge, acting on behalf of himself and his brother, knowingly and intelligently relinquished the opportunity to an evidentiary hearing of that threshold eminent domain issue. The opportunity was afforded in early 1981 to the brothers, first by the City and then by the trial court, for the re-presentation of "necessity" evidence. During a subsequent hearing in 1985, and after an extensive review of the record of the earlier proceedings, it was confirmed that the brothers had knowingly declined the opportunity to challenge the municipal need for the land. Petitioners have not presented to this Court a federal question which conflicts with any other court decision, nor one which involves an important question of federal law. U.S. Sup. Ct. Rule 17.1(b), (c), 28 U.S.C.A.

ARGUMENT

THE DETERMINATION OF THE FLORIDA COURTS, THAT PETITIONERS HAD WAIVED THEIR RIGHT TO A JUDICIAL DETERMINATION OF PUBLIC NECESSITY IN AN EMINENT DOMAIN PROCEEDING, WAS NOT VIOLATIVE OF PETITIONERS' RIGHTS AS GUARANTEED BY THE FIFTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES.

The brothers seek review of a trial court ruling entered approximately two years ago, which ruling expressly found that the brothers

* * *

knowingly and intelligently waived the right to contest the issue of Petitioner's (the City's) necessity for the taking of Parcel 3-8.

* * *

Order of July 22, 1985 (Petitioners' Appendix, A. 5, page 2).

As the Florida appellate court which reviewed that ruling previously determined in an unrelated case,

The most frequently and generally accepted definition of "waiver" is the intentional relinquishment of a known right, or the voluntary relinquishment of a known right, or

conduct which warrants an inference of the relinquishment of a known right.

Wilds v. Permenter,
228 So. 2d 408 (Fla. 4th DCA 1969).

A review of the attempts in 1981 by the original trial court in these proceedings to afford the brothers an opportunity to have a new necessity hearing conducted, if desired, constitutes the best evidence of both the intentions and concerns of the brothers. (Respondent's Appendix, A. 1, pages 7, 9; Petitioners' Appendix, A. 6). Those intentions and concerns were re-visited and clarified, as is evident from a review of testimony elicited from Mr. Judge at the April 26, 1985 hearing. The single-minded purpose of the brothers, speaking through Mr. Judge, becomes apparent when his responses to questions at the latter hearing regarding the validity of the waiver are considered:

* * *

Q. (by Mr. Schwartz) Now, did you ever give up your right to have the City prove they were entitled to the property? Did you ever tell the Court that you did not want the City to prove to the satisfaction of a judge that they had the right under all the circumstances to take your property?

A. (Mr. Judge) No, sir. *The only thing that I tried to prove to the Court is that the City committed a fraud from the first day they took my property up until this date and the facts are proven.*

Q. And do you—do you maintain today that you are entitled to have the City prove why they picked out your property, why they didn't let it remain when there were other churches in the area?

Do you want this judge here to decide whether the property was—

A. Well, *what I want the City to do is, to come—what should be done is that the City come in and let a jury find them guilty of defrauding me out of my property with the help of Judge Bridge and Judge Tedder, Mr. Baron, Betty Baron and that's what I am looking for and I believe the jury will find them guilty.*

* * *

(Petitioners' Appendix, A. 8, pages 13-14; emphasis added).

If any questions remained over the validity of the 1981 waiver and its surrounding circumstances, they dissipated after the 1985 hearing, since the entire matter was thoroughly reviewed at that time by the new trial judge. Once the trial court weighed the testimony of the witnesses, supplemented by a subsequent review of the court file, comprised of twelve volumes of documents, and including a review of depositions and of each transcript of each of the prior hearings (Petitioners' Appendix, A. 5, page 1), it was apparent that the "necessity" issue was not a concern of the brothers. Nothing less than an unqualified return of the property and an admission of illegal conduct by the City was consistently demanded by the brothers:

* * *

(By the Court) . . .

All I can say to you, sir, is do you or *do you not want this hearing? Yes or no?*

(Mr. JUDGE): *No, I do not want to have an order of taking set aside, due to the fact that I have proof that the City has taken legal (sic) possession of the property, and was supposed to demolish the property the 28th of December.*

So the only possible way I could receive my property back—Let the City come and say, “Mr. Judge, there was a mistake. Mr. Judge, we are going to let you accept the responsibility of this property because it was illegal the way we took it.”

* * *

(Petitioner's Appendix, A.6,
pages 3-4; February 25, 1981
hearing on Motion to Set Aside
Order of Taking; emphasis added).

The waiver was expressly made and understood. Petitioners were not confronted with a Hobson's choice, compelling them to surrender one constitutional right in order to preserve another. The claim of fraudulent wrongdoing by the City and others was the only concern expressed by the Petitioners. That is a claim which remains unsubstantiated. It is not presented in this proceeding.

An important question of federal law has not been presented to this Court. No conflict with other court decisions has been shown by Petitioners. A factual determination of waiver was made by one trial court, thoroughly examined and upheld by a successor trial court, reviewed and sustained after oral argument by a Florida appellate court, and dismissed by the Florida Supreme Court.

CONCLUSION

The Florida courts were correct in their determination that the Petitioners knowingly and intelligently relinquished the right to a hearing on the issue of municipal necessity for acquisition of the subject land. The City respectfully requests that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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IN THE CIRCUIT COURT OF THE SEVENTEENTH
JUDICIAL CIRCUIT IN AND FOR BROWARD
COUNTY, FLORIDA. CIVIL ACTION

No.: 80-10997

CITY OF FORT LAUDERDALE,
a Municipal corporation of Florida,

Petitioner,

vs.

LAVERNE W. MOORE, et al.,

Defendants.

Fort Lauderdale, Florida

January 9, 1981

10:00 o'clock A.M.

The above-entitled cause came on for Hearing on the
the [sic] Defendants' Motion to Withdraw, before the
Honorable BARBARA BRIDGE, Presiding Judge, at
Broward County Courthouse, Fort Lauderdale, Broward
County, Florida, on January 9, 1981, commencing at
10:00 o'clock A.M.

APPEARANCES:

ROSS, NORMAN & CORY, P.A.,
by DONALD H. NORMAN, ESQ., of counsel,
appearing on behalf of the Petitioner.

LAW OFFICES OF TOM BUSH,
by TOM BUSH, ESQ., of counsel,
appearing on behalf of the Defendants.

ALSO PRESENT: JACOB JUDGE

Thereupon:

The following proceedings were had:

MR. BUSH: Your Honor, we are here on a Motion to Withdraw. And I'll explain to the Court the reasons behind the Motion to Withdraw.

This Court will recall that this week we were before this Court, and it was agreed at a short hearing that today would be a day in which the City of Fort Lauderdale would present—re-present its evidence on the necessity of taking of Mr. Judge's property.

Subsequent to the hearing of last week Mr. Judge and I had a telephone conversation, which I don't believe that I should really discuss with the Court because of it being a privileged communication between myself and Mr. Judge, but suffice it to say there was a disagreement in the position as to which way I should proceed in the

representation of Mr. Judge. And it was my suggestion, and at Mr. Judge's concurrence, that I withdraw from further representation of him.

It's especially at my desire, and I think that Mr. Judge—And he can speak for himself in a moment—But I think that he probably concurs in my desire to withdraw from representing him.

And that's basically the motion.

THE COURT: And you're in accord with that; are you, Mr. Judge?

MR. JUDGE: In accord.

THE COURT: Meaning you agree with that?

MR. JUDGE: I mean, I can't do anything but agree. According to the Constitution, Mr. Bush can either represent me, according to the Constitution, or not.

THE COURT: All right, sir.

Then I'll grant the Motion to Withdraw.

And then any further hearings, Counsel, or Mr. Judge, in your respective rights, you can set before me, gentlemen.

MR. BUSH: I'll be glad to give Mr. Judge or his new attorney, either one, copies of all correspondence and matters I have in my file. You can get anything you want in my file.

THE COURT: Do we have any further notices to go to Mr. Judge at his residence address?

MR. NORMAN: I wish the order would say where future notices would go. Of course, Mr. Judge has a brother, too, Samuel Judge, who is a party to this case, and we would not want to leave him out for any reason.

THE COURT: Okay.

Where should your notices go?

MR. BUSH: Did I file an appearance?

MR. NORMAN: I believe you filed for both Jacob and Samuel Judge.

MR. BUSH: I want to withdraw from Samuel Judge, also. Let's see if I did.

I did.

THE COURT: Yes. Your order is indicating it. Whoever had these files, sure—

MR. JUDGE: Shouldn't you discuss that with my brother before you withdraw with him?

MR. BUSH: The difficulty I have, I'll be glad to do that, and I'll be glad to set that down with him, but I never talked to his brother; and Mr. Judge was to provide me with a written authorization for me to represent Mr. Judge, which you never did.

MR. JUDGE: Yes, I did.

MR. BUSH: Do I have it?

Okay. So I'll just have to notice him along the same lines that I'll be withdrawing from representing him.

THE COURT: That's fine with me, but he's going to have to come in here, or if not in here—

MR. JUDGE: He have to sign the paper that he would like for you to withdraw or whether he would like for you to continue. I'm only speaking for myself and the Constitution of the United States.

MR. BUSH: That's fine. Your brother is—You know, he can either sign a stipulation or we can set it down for a hearing, Your Honor.

THE COURT: Would you give me another order then?

MR. BUSH: No, I'll give you a separate order on—

THE COURT: So we can have the address to notice Mr. Judge that's here today.

MR. NORMAN: I might ask at this time, if I can, if Mr. Judge would like us to proceed to put on evidence as to the necessity, or if he wants time to get another attorney, or whatever he wants to do so we know how to proceed.

MR. JUDGE: Judge, well, I mean, you know, it seems like we're just making a real big issue out of something that is very clear to anyone what's going on here. And I can't see why—Maybe me and Mr. Norman

and people down at the City Hall can get together and talk and solve this matter. I mean—

THE COURT: Well, Mr. Judge, what we could do, if you would like, sir, the City is more than willing to go through the necessity order of taking procedure that, you know, they have done before.

If you want to talk to them, and if you want them to go through that procedure, why don't you just write a letter—Put this case number on it—to Mr. Norman and say you want to have that hearing. If not, we'll just go along the way we are.

Is that agreeable, sir?

MR. JUDGE: Well, whatever they want to do.

MR. BUSH: Mr. Norman will be glad to speak with you, also. However, if you want to talk with him, if you want to sit down and just get across the table and talk with him, I think he's more than willing to do that.

I can't speak for him but—

MR. JUDGE: You see, Your Honor, it's not just particularly the property. You know, I begin to buy this property in '73. Purchase price of \$10,000. All right. From '73 up to today I paid \$15,000 on the property.

Mr. Baron sent me a financial statement stating that I owed him \$10,887.

THE COURT: Who is Mr. Brown?

MR. NORMAN: Baron.

THE COURT: Oh, Mr. Baron.

MR. JUDGE: Mr. Baron. Right.

And, you see, it just doesn't work out well.

THE COURT: Do you have all your records, sir, and everything?

MR. BUSH: Yes, he's got—He's absolutely right. What has happened is he got into an agreement for deed at 10 percent interest, which is resulting in him—in forcing him to pay the Barons, you know, a tremendous amount of money, which I have attempted to negotiate with the Barons. They're being hard-nosed. And so I have advised Mr. Judge to be hard-nosed back and not put the money in any interest-bearing account and not to do anything with the money, but let it sit in Court until they come down with the amount of interest.

THE COURT: That's something you agree with, anyway.

MR. BUSH: He's right.

THE COURT: That will have to be worked out between the parties, or maybe before we're done. But some kind of equitable or, what, distribution here.

Mr. Judge, then, at this time, If I understand you, if you want to get an attorney, fine sir. But Mr. Bush is going to send me an order saying he's withdrawn, and

any further notice on any hearings are going to go to you at your address.

MR. JUDGE: Yes.

THE COURT: What is that address, sir?

MR. JUDGE: 3400 Northwest 5th Street.

THE COURT: And that's in Fort Lauderdale, sir?

MR. JUDGE: Yes, ma'am.

THE COURT: Do you know your Zip Code?

MR. JUDGE: 33311.

THE COURT: 33311.

And then, sir, if you want the City to do a hearing called—which we call an Order of Taking, it's really a hearing on what the plans are and why they want to use the area for what they're doing, and what the necessity of it is. If you want that hearing, you notify Mr. Norman and the Court.

Would you do that, sir?

They were willing to do it today, but under these circumstances, then, we won't go ahead with that. But if you want to have that hearing, you notify the Court, sir.

MR. JUDGE: I'll do that.

THE COURT: All right.

This matter then, if there is nothing further, is adjourned and off the record.

MR. NORMAN: Thank you, Your Honor.

(Thereupon, the hearing was concluded.)

CERTIFICATE

I HEREBY CERTIFY that the foregoing, pages 1 to and including 9, is a true and correct transcription of proceedings had before the Honorable BARBARA BRIDGE, Presiding Judge, at Broward County Courthouse, Fort Lauderdale, Broward County, Florida, on the 9th day of January, 1981, commencing at 10:00 o'clock A.M.

IN WITNESS WHEREOF I have hereunto affixed my hand this 15th day of November, 1983.

[sig illegible]
(Reporter)